

**Matter of 55 Kennedy Blvd., LLC v Building
Dept. of Town of Smithtown**

2007 NY Slip Op 32001(U)

July 2, 2007

Supreme Court, Suffolk County

Docket Number: 0016430/2006

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI

Justice

In the Matter of the Application of
55 Kennedy Blvd., LLC.,
Petitioner

For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

The Building Department of the Town of Smithtown
Peter Hans, as Acting Director of the Planning
Department of the Town of Smithtown, the Planning
Department of the Town of Smithtown, Department
of Environmental Protection of the Town of
Smithtown, Russell K. Barnett, as Director of the
Department of Environmental Protection, the
Department of Environment & Waterways of the
Town of Smithtown, and the Town of Smithtown,

Respondents

Motion date: 7/20/06
Submitted: 4/25/07
Motion Sequence No.: 001 Mot D
CASE DISP
Index No. 06-16430

Attorney for Petitioner:
Scheyer & Jellenik
110 Lake Avenue South, Suite 46
Nesconset, NY 11767
Attorney for Respondents:
Office of the Town Attorney
99 West Main Street
P O Box 575
Smithtown, NY 11787

Upon the following papers numbering 1 to 10 read upon this Article 78 petition:
Notice of Petition and supporting papers 1 - 4;
Affirmation in Opposition, Return and supporting papers 5 - 8;
Replying Affidavits and supporting papers 9 - 10;
it is

ORDERED that this petition brought by 55 Kennedy Blvd., LLC for a judgment pursuant to CPLR Article 78 is granted to the extent that the court finds that the Town acted arbitrarily in refusing to process petitioner's application and the Town of Smithtown is directed to process and approve the site plan application and issue a certificate of occupancy for the subject building. The

petition is in all other respects, denied.

As stated in this court's previous order, in this hybrid CPLR Article 78 Proceeding and action for declaratory judgment, petitioner seeks: to compel respondents to process and approve a site plan application and issue a Certificate of Occupancy for the subject building; a determination that the Town acted arbitrarily in refusing to process petitioner's application; an injunction to prevent the Town from acting as an enforcement agent for the Suffolk County Department of Health Services; and a judgment declaring that the Town of Smithtown does not have the authority to enforce Suffolk County Health Department regulations or to take over as lead agency under SEQRA on a County Health Department issue.

*** (T)he determination of a municipal land use agency must be confirmed if it 'was rational and not arbitrary and capricious'. A determination will be deemed rational if it has some objective factual basis, as opposed to resting on subjective considerations *** (Halperin v. City of New Rochelle, 24 AD3d 768, 809 NYS2d 98 2d Dept. 2005] quoting Sasso v. Osgood, 86 NY2d 374, 633 NYS2d 259).

Petitioner, 55 Kennedy Blvd., LLC ("petitioner") is a long term lessee of certain real property that is presently owned by the New York State Job Development Authority, and for purposes of this proceeding, the equivalent owner of the property. Petitioner made certain changes to this commercial property, increasing the amount of office space and decreasing the warehouse space, and thereafter sought to legalize the same. In 2001 petitioner filed a site plan application with the Town of Smithtown Department of Planning and Community Development. Since petitioner did not have the sanitary flow capacity as required by the Suffolk County Department of Health Services, this application lapsed as petitioner sought acceptance of a transfer of development rights ("TDR") from Suffolk County Department of Health Services wherein petitioner would transfer the development rights to a parcel of property it purchased in Wyandanch to Suffolk County. In July 2003, the County accepted the TDR and the Suffolk County Department of Health approved petitioner's variance application.

In August 2003, after petitioner received Health Department and SEQRA approval for the TDR transfers including approval to upgrade and supplement the existing septic system at the site and to up-size the permitted sanitary flow by one thousand gallons per day, petitioner attempted to re-file site plans with the Town. Petitioner's attempt to save money by filing a site plan exemption proved futile as the Town by letter dated September 17, 2003, informed petitioner that it was not eligible for an exemption because of three listed reasons: the parking proposal would require paving of previously unpaved area of greater than 20,000 square feet; the proposed alteration to the building would exceed allowable density and would therefore require a variance form the Suffolk County Department of Health Service Board of Review; and it appeared that the applicant was proposing to use a TDR involving property outside the Town of Smithtown which would require a full SEQRA review. Petitioner responded with a letter from counsel dated November 5, 2003 agreeing that the present application was ineligible for a site plan exemption and indicating the client would be filing a full site plan application. However,

counsel pointed out that respondent's second concern was satisfied since the Suffolk County Department of Health Services had approved the application subject to covenants and restrictions and a Transfer of Development Rights. Finally, counsel disputed the town's SEQRA claims, indicating his position that Suffolk County was the lead agency.

Thereafter, petitioner filed a site plan application along with an application to the Zoning Board of Appeals for a parking variance, the latter of which was granted.

On September 21, 2004 the Town of Smithtown Department of Environment and Waterways ("DEW") forwarded a letter to petitioner stating that preliminary review of its site plan application indicated that the same was incomplete and requested official documentation from the Suffolk County Department of Health Services stating the sanitary flow is approved; documentation of a different proposed deed restriction on a parcel in Hauppauge; and a copy of the Special Exception that was granted.

The Town was taking the position that the restricted parcel must be within the Town of Smithtown in order to avoid full SEQRA review. Petitioner notified The Town by letter dated May 5, 2005 that it located property within the Town of Smithtown, specifically 1.8 acres in Head of the Harbor that they would purchase and then transfer development rights. By letter dated July 7, 2005 the Town DEW notified petitioner that the sanitary flow on the 1.8 acre site in the Village of the Head of the Harbor was a maximum of 300 gallons per day which would be insufficient to meet the excess 1000 gallons per day of sanitary flow at the subject site and concluded by stating: "Consequently, please be advised that if the above referenced matter is not corrected within sixty two (62) days of your receipt of this letter, the subject application will be automatically denied pursuant to Section 322-89C of the Smithtown Town Code." Petitioner took no further action until commencing the instant proceeding on June 20, 2006.

The record herein does not support a finding that SEQRA review was coordinated. However, it is evident from the Return that the Town was long aware that the Suffolk County Department of Health Services ("SCDHS") had approved petitioner's donation of property located in Wyandanch as part of its requirements for approval for a variance from the Suffolk County Department of Health Services Board of Review and that the Suffolk County Legislature had declared itself lead agency and determined that this unlisted action did not have a significant effect on the environment (see Return exhibit 34 and Exhibit 47). Counsel for the Town concedes that it was formally notified of the approval by the SCDHS on August 25, 2004. Yet despite arguing that the SCDHS erroneously approved petitioner's application for a TDR from a parcel located outside the Town of Smithtown and that the SCDHS did not follow its own standard in accepting the Wyandanch parcel as the TDR for the Smithtown parcel, the Town did not challenge this determination and will not be now be heard to collaterally challenge such decision almost three years later in a proceeding to which the SCDHS is not even a party.

The Town's statement that it is not usurping the jurisdiction of the SCDHS nor trying to act as an enforcement agent for the SCDHS is belied by their argument that the SCDHS erred in

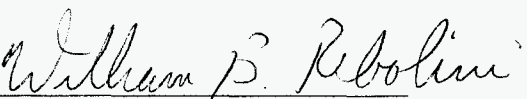
granting petitioner's variance. While respondent claims is acting within its rights and obligations, it cites no authority that gives the Town jurisdiction over waste water capacity. As conceded by counsel, The Suffolk County Department of Health Services has jurisdiction over Suffolk County's wastewater flow. Moreover, while the Town complains that the SCDHS standards require that the TDR must be within the same town, review of the section cited by counsel indicates that the sending parcel must be located within the same township as the receiving parcel and lists various other standards, which if all are met, obviates the need for a variance. As the Town also concedes, the SCDHS in fact issued a variance based upon the TDR from an out of township donation.

Finally, the fact that petitioner was attempting to satisfy the Town by offering other lots in Smithtown in order to avoid the instant litigation will not be heard in opposition to this petition.

Since the Town's refusal to issue a certificate of occupancy is not based upon a legally tenable argument, it cannot be said that there is an objective factual basis for its decision. Thus its decision is arbitrary and capricious and the Town is directed to process and approve the petitioner's site plan application in accordance with this order and issue the necessary certificate of occupancy.

The foregoing constitutes the order and judgment of the court.

Dated: July 2, 2007


HON. WILLIAM B. REBOLINI, J.S.C.